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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
Petitioner,
v.
FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The question presented in this case is straightforward: "whether a court applying heightened scrutiny to restrictions on speech . . . must defer to factual determinations and assumptions made by an administrative agency so long as they are not 'arbitrary and capricious.' " Pet. i. In its response the government provides an equally straightforward answer: yes, it must. According to the government, "heightened scrutiny" applies to part, but only part, of regulations imposed on the press. In its view, a reviewing court properly gives heightened scrutiny to whether the asserted government interest is substantial *in the abstract* and, apparently, to whether the regulation *on its face* employs improper means. But, on the crucial subsidiary questions—*i.e.*, those necessary to determine whether the government interest is genuine *in fact* and whether the regulation *in fact* depresses more speech than

necessary to serve it—intermediate scrutiny ends, to be replaced by the usual highly deferential inquiry into whether the regulation is "arbitrary and capricious." From that point on, it appears, review of regulations imposed on the press is to be no more stringent than review of economic regulations imposed on any other industry.

This novel bifurcation of the intermediate scrutiny test, in and of itself, raises questions of considerable importance. Moreover, it seems wholly out-of-step with a number of recent cases from this Court. Those cases have stated plainly that the government bears the burden of showing that its asserted interest is in fact genuine and substantial (not just in the abstract) and further that its regulation does not in fact burden more speech than necessary. *See, e.g., Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445, 2470 (1994) (plurality opinion); *Edenfield v. Fane*, 113 S. Ct. 1792, 1798-99 (1993); *Ibanez v. Florida Dept. of Bus. & Prof. Regulation*, 114 S. Ct. 2084, 2089 (1994). By contrast, the theory now advanced by respondents would allow the government far too much leeway to justify regulation merely by rote invocation of substantial interests (*e.g.*, preventing abuse of "monopoly power"), without assuming the more significant burden of showing that targeted regulation of activities involving speech is actually motivated by something more than political disfavor.

Proper application of heightened scrutiny is all the more important here, given that this entire, extraordinary scheme of rate regulation rests upon a single, unproven theory: that the initial rates of competing cable systems—used as a benchmark to justify the forced reduction of rates for *all* systems—are a reliable indicator of competitive rates, while later (higher) rates of those same systems are not. Thus, while there is good reason to think that initial rates are artificially low, the government instead chose to assume (without an iota of actual proof) that later rates are artificially high, relying on a theory of possible collusion that is nothing more than sheer

guesswork. Even Judge Ginsburg, applying his "particularly deferential" approach (Pet. App. 7a), could say nothing more flattering about this hypothesis than that it was "not so implausible that reliance upon it is unreasonable" (Pet. App. 15a)—the faintest of faint praise. Indeed, to defer to that ungrounded speculation is even more inappropriate in light of the fact that, after the initial rate order was issued, members of Congress had put strong pressure on the Commission to cut cable rates even more, and the Commission responded by reinterpreting the same data to justify cuts of an additional seven percent. *See* Pet. 9-13.

1. The position taken by the government—most of which is buried in a footnote (Br. in Opp. 17-18 n.6)—is that a court, applying heightened scrutiny to restrictions on speech, passes in and out of heightened scrutiny according to the nature of the issue before it. In particular, the government argues that, in addressing what it calls "subsidiary economic questions" (*id.*), reviewing courts must "accord[] deference to the expert agency's findings," further contending that the court below (per Judge Ginsburg) had to accept those findings so long as they were not arbitrary and capricious. But this theory suffers from a critical flaw: it largely reads out of the applicable First Amendment test the requirement that the government "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *See Turner*, 114 S. Ct. at 2470 (plurality opinion); *Edenfield*, 113 S. Ct. at 1798-99. And, by the same token, it largely relieves the government of "the burden of showing that the remedy it has adopted does not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" *Turner*, 114 S. Ct. at 2470 (plurality opinion) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)). Yet it is those requirements, taken together, that protect freedom of speech (and freedom of the press) from regulations that, while justified

in theory, turn out to be unnecessary in fact to advance any genuine governmental interest.

This Court has thus emphasized that, in cases implicating First Amendment rights, courts have "a constitutional duty to conduct an independent examination of the record as a whole . . . ." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 115 S. Ct. 2338, 2344 (1995). The reason, as the Court has noted, is simple: "the reaches of the First Amendment are ultimately defined by the facts it is held to embrace." *Id.* Those facts—and the grounds for crediting or discrediting them—in the end determine "whether a given course of conduct falls on the near or far side of the line of constitutional protection." *Id.* Rather than broadly deferring to the government on factual issues, therefore, this Court has repeatedly taken a hard look at the grounds advanced to support restrictions on speech. *See, e.g., Edenfield*, 113 S. Ct. at 1800-04; *Ibanez*, 114 S. Ct. at 2089-92; *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1590-94 (1995). *See also United States v. National Treasury Employees Union*, 115 S. Ct. 1003, 1015-18 (1995).[1]

It is precisely this judicial exercise of "independent judgment" that distinguishes heightened scrutiny from garden-variety review of government action. Although the government repeatedly argues that judges must give deference to legislative and administrative judgments, we think that this blanket insistence misses an important point: that the proper level of deference varies inversely with the level of judicial scrutiny to be applied. In the

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[1] The idea that the government will assert a hollow interest is hardly fanciful. For example, although the government for years has claimed that the must-carry law was needed to forestall a threat to the economic viability of local broadcasting (citing a finding by Congress to that effect), it now concedes—having been put to its proof—that no such threat actually exists. *See* Gov't Motion to Affirm, *Turner Broadcasting System, Inc. v. FCC*, No. 95-992, at 19.

equal protection context—where, like the First Amendment context, there are different levels of review—courts typically give highly deferential scrutiny to the factual basis for classifications subject to the rational basis test, whereas review of the grounds for more suspect classifications is properly less deferential (*see, e.g., Craig v. Boren*, 429 U.S. 190, 199-204 (1976)), or hardly deferential at all (*see, e.g., Miller v. Johnson*, 115 S. Ct. 2475, 2491 (1995)). The "arbitrary and capricious" standard, of course, is the standard routinely applied to agency actions implicating no significant constitutional concerns and incorporates within itself a strong presumption in favor of the correctness of agency decision-making. It thus reflects a degree of deference that is out of place in review of actions subject to more heightened scrutiny.

The importance of applying the proper standard can be readily seen in this case. The wide-ranging scheme of rate regulation rests upon an assumption—avoidable only by electing to undergo an expensive "cost-of-service" proceeding (*see* pages 9-10 *infra*)—that any cable system not facing direct competition by a second cable system is charging 17% more than a competitive rate. The *entire basis* for this assumption, however, is data showing that the initial rates of direct competitors are 16% lower than rates of systems without direct competitors. After that initial period, even the government concedes that the rates of competing systems are only slightly lower than the rates of other systems, but the government disregards that latter figure entirely on the ground that it "might" be the result of collusion. As we have noted, Judge Ginsburg found that theory to be a sufficient basis for regulation, because (in his view) it "is not so implausible that reliance upon it is unreasonable, especially when one considers that there is no evidence in the record, either anecdotal or analytical, to provide empirical support for the cable companies' price war hypothesis." Pet. App. 15a.

It is hard to imagine a much shakier foundation for regulation of this scope. To begin with, there is really no need to rely on conjecture at all: only about 30 communities have head-to-head competing cable systems, making it entirely possible for the government (without unreasonable effort) to make further inquiries to test its theory. The government has made no effort, however, to determine whether its hypothesis is correct or not. Furthermore, even at the theoretical level, it is well-accepted that competitors in any industry, during an initial period of competition, may elect to compete on the basis of prices that are not sustainable over the long run. If that is happening in the cable industry—as there is good reason to suspect (*see* Pet. 28 n.21)—then the guiding premise of the rate regulation scheme (*i.e.*, that the initial rates of competing systems are stable competitive rates) is wrong. Yet, at the critical point of its analysis, the government was content simply to rely on its unproven conjecture—that the declining differential is the result of collusion—without even bothering to explain why that theory is more likely to be correct than the opposite theory (*i.e.*, that the long-term rates represent true competitive rates after an initial period of unsustainable price-cutting).

Even if this hypothesis is "not implausible," therefore, one thing remains clear: the government has no idea whatsoever whether it actually holds true. In fact, the government has no evidence at all to demonstrate that any of the competitive systems has ever engaged in collusion or other anticompetitive conduct. But assumptions without evidence are precisely what this Court has repeatedly found inadequate to sustain regulation of speech. *See* cases cited at page 4 *supra*. The same principle should apply here.[2]

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[2] As we discuss in the petition, the government relied on similar assumptions in explaining away other data inconsistent with its sweeping rate order. *See* Pet. 26-30.

2. Although the government suggests that review of "economic analysis" is beyond the competence of the courts, Br. in Opp. 20-21, there are several problems with this suggestion. As far as this case is concerned, the obvious point is that, with respect to the central dispute over rates of competitive systems, there is no "analysis" to defer to. Faced with data supporting its regulation (the level of initial rates) and data undercutting its regulation (the level of long-term rates), the Commission simply opted for a theory (collusion) that justified more severe cuts. Furthermore, and more generally, there is nothing about "economic analysis" that makes it categorically impervious to serious judicial review. The Court commonly deals with economic issues far more complicated than any presented here. *See, e.g., Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578, 2591-98 (1993); *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 460-86 (1992).

The suggestion of institutional incompetence may be nothing more than an indirect way of saying that economic regulation of the press—even regulation singling out part of the press—should not be subject to heightened scrutiny in the first place. After all, that is the position taken by the government two Terms ago in *Turner Broadcasting*. But the Court rejected that position, and correctly so. "Economic" regulation of the press raises constitutional concerns that are absent in regulation of other industries not involved in providing speech to the public.

Those concerns take several forms. First of all, there is the prospect (raised by the law at issue here) that government regulation will adversely affect the quality or quantity of speech itself. It is entirely possible, for example, that regulation by the government will take the form of controlling the price of a particular commodity even at the risk of lessening its quality. As a general rule, that choice causes no constitutional problems, but

that is not the case if the "commodity" is speech. While members of the press have no immunity from the antitrust laws, they should nonetheless have the right (within the bounds of generally-applicable laws) to choose how much speech to offer and what quality it should be. The fact that the government might prefer to have less speech (or less high-quality speech) in order to reduce prices to consumers is not, by itself, a sufficient reason to interfere with freedom of the press.

There is also cause for concern that government, by targeting some speech businesses for regulation, will necessarily make them dependent on government favor, thereby giving government officials greater control over the content of speech. Those links may be explicit (*e.g.*, the government will not regulate rates if the industry voluntarily increases or decreases the amount of certain programming) or implicit (*e.g.*, the government is less likely to regulate rates if the industry has gained favor by increasing or decreasing the amount of certain programming). Either way, however, the power of government to subject speech businesses to regulation not faced by other businesses threatens to erode the traditional—and highly important—separation between government and the press.

We believe, therefore, that "economic regulation" of the press is rightly subject to heightened scrutiny and that this scrutiny, to be meaningful, must apply at each stage of the analysis, not just at the initial stage of determining whether the government has asserted substantial interests in the abstract. Despite government efforts to suggest otherwise, however, this tougher scrutiny need not be the equivalent of *de novo* review. As noted previously, *see* page 4 *supra*, we believe that deference to administrative judgments moves along a sliding scale, decreasing as the extent of judicial review becomes stricter, and as the burden of justification assigned to the government becomes greater. Given that continuum, it is simply misguided to insist, as the government does, that judicial

deference to economic analysis must be the same in all contexts: that is, regardless of whether that analysis, if poorly grounded, diminishes the quality of speech or the quality of railroad service. As this Court has indicated in establishing a standard of heightened scrutiny, proper protection of the marketplace for speech requires something more.[8]

3. The government defends its general benchmark scheme as necessary to avoid a burdensome cost-of-service regime, which Congress itself plainly saw as too costly and time-consuming. In the next breath, however, the government tries to rely on the availability of this same cost-of-service regime as a solution for any imperfections in its benchmark efforts. But this Court has already held that a government may not excuse imposition of "a surrogate and imprecise formula" on the charges of businesses engaged in speech on the ground that those businesses can resort to a burdensome alternative. *Riley v. National Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 793-94 & n.8 (1988). As the Court remarked, it is impermissible to "requir[e] the speaker to prove 'reasonableness' case by case based upon what is at best a loose inference that the [charges] might be too high." *Id.* at 793. The same reasoning applies here: the government cannot build a flawed "competitive rate" out of speculations and assumptions and then require cable systems either to abide by it or to submit to long, expensive cost-of-service proceedings to show that their rates are not unreasonable.

The government also appears to make the unwarranted assumption that it could subject all cable systems to cost-

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[8] This issue, in one form or another, is before the Court in *44 Liquormart, Inc. v. Rhode Island*, No. 94-1140, and the telephone-cable cross-ownership cases (*United States v. Chesapeake and Potomac Telephone Company of Virginia*, No. 94-1893; *National Cable Television Association, Inc. v. Bell Atlantic Corp.*, No. 94-1900), cases in which businesses have challenged the grounds for limitations on their ability to speak.

of-service regulation without raising constitutional problems. But the prospect of government officials reviewing the books of businesses engaged in speech—much less dictating what costs will be allowed or disallowed—surely raises questions of adequate justification against the historical background of an institutionally independent press. Even assuming that this sort of regime might be tolerable under certain circumstances, it would have to rest, at a minimum, upon a convincing showing by the government that there was pervasive, industry-wide abuse of monopoly power. The lack of any such showing, however, is the central problem with the benchmark scheme. Thus, whatever type of regulation the government seeks to impose on the rates of cable systems, it must come forward with more than assumptions and hypotheses to explain away contradictory data. The court below did not require it to do so, and its judgment should be reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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